



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 22, 1996

Mr. Gary Keane  
General Counsel  
Dallas/Fort Worth International Airport  
P.O. Drawer 619428  
DFW Airport, Texas 75261-9428

OR96-2184

Dear Mr. Keane:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36271.

The Dallas/Fort Worth International Airport (the "airport") received an open records request for various records pertaining to the awarding of a contract for the static display advertising concession at the airport's passenger terminals. You state that the airport has released to the requestor most of the requested documents. However, you have requested an open records decision from this office pursuant to section 552.305 of the Government Code with regard to certain financial information submitted to the airport by Transportation Media, Inc. ("TMI"), the party that was awarded the contract. Consequently, this office notified representatives of TMI that we received the airport's request for an open records decision regarding the public disclosure of portions of TMI's proposal that contain detailed financial information. TMI contends that part of the information you submitted to this office constitutes "personal financial information" and thus comes under the protection of common-law privacy and that other financial information must be withheld pursuant to section 552.110 of the Government Code.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including the common-law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. In Open Records Decision No. 373 (1983), this office addressed the availability of personal financial information submitted to a city by an

applicant for a housing rehabilitation grant. In that decision, this office concluded as follows:

[a]ll financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Open Records Decision No. 373 (1983) at 3.

Whether the public has a legitimate interest in such information, however, must be determined on a case-by-case basis. *Id.*; *see also* Open Records Decision Nos. 600 (1992), 545 (1990). In this instance, no showing has been made that the public has a legitimate interest in this individual's personal financial information. We therefore conclude that the personal financial information contained in the "Financial Cash Flow & Contingent Liability" statement must be withheld in its entirety pursuant to section 552.101.

We next address whether TMI's financial information submitted to the airport must be withheld from the public pursuant to section 552.110 of the Government Code, which excepts from required public disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it

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<sup>1</sup>In light of a recent change in this office's interpretation of the "commercial or financial information" branch of section 552.110, this office informed representatives of TMI in a second notification letter of their opportunity to submit additional information to this office as to why the financial information at issue should be withheld as "commercial or financial information." *See* Open Records Decision No. 639 (1996). Because this office has not received a response to our February 23, 1996 notification, we assume that TMI does not wish to supplement their argument under this branch of section 552.110.

relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert denied* 358 U.S. 898 (1958) (adopting Restatement § 757 definition of trade secret). This office must accept a claim that information is excepted as a trade secret if a prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.

There are six factors to be assessed in determining whether information qualifies as a trade secret.<sup>2</sup> Although the TMI representative responding to our initial notification has attempted to apply the six factors to the financial information at issue, we do not believe that the information meets the general definition of "trade secret" as laid out above. The information at issue is not a "formula, pattern, device or compilation of information which is used in one's business," nor is the information "a process or device for continuous use." We therefore conclude that the information at issue does not constitute a trade secret.

Finally, we address whether the information at issue must be withheld as "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Section 552.110 is patterned after section 552(b)(4) of the federal Freedom of Information Act, 5 U.S.C. section 552 *et. seq.* Open Records Decision Nos. 639 (1996), 309 (1982), 107 (1975). The test for determining whether commercial or financial information is confidential within the meaning of section 552(b)(4) involves considering the possible effects of the release of the information:

a commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have *either* of the

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<sup>2</sup>These six factors are

- 1) the extent to which the information is known outside of [the company's] business; 2) the extent to which it is known by employees and others involved in [the company's] business; 3) the extent of measures taken by [the company] to guard the secrecy of the information; 4) the value of the information to [the company] and to [its] competitors; 5) the amount of effort or money expended by [the company] in developing this information; and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 comment b (1939); *see also* Open Records Decision No. 232 (1979), *supra*.

following effects: 1) to impair the Government's ability to obtain necessary information in the future; or 2) to cause substantial harm to the competitive position of the person from whom the information was obtained. (Emphasis added.)

*National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

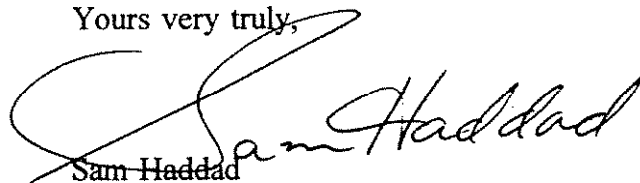
As to the first effect, the governmental body that maintains requested information is in the best position to determine whether disclosure will impair its ability to obtain similar information in the future. You have expressed no opinion on this subject. As to the second effect, the courts have held that

in order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. *Actual competition and the likelihood of substantial competitive injury* is [sic] all that need be shown. (Emphasis added.)

*Gulf & Western Industries v. United States*, 615 F.2d 527, 530 D.C. Cir. 1979); see also *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976). "Conclusory and generalized allegations" of competitive harm have been held insufficient to satisfy the requirements for non-disclosure. See *National Park v. Kleppe*, 547 F.2d 673, 680. In this instance, TMI has not demonstrated how the release of this information would result in substantial competitive harm. We therefore conclude that the airport may not withhold this information as "commercial or financial information" pursuant to section 552.110 of the Government Code. This information must be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Sam Haddad", is written over a horizontal line.

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/RWP/ch

Ref.: ID# 36271

Enclosures: Submitted documents

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